The Journal of Appellate Practice and Process

Volume 20 | Issue 2 Article 4

2021

The End of An Era? Abolishing the Abstract Requirement For Arkansas Appellate Briefs

Jessie Wallace Burchfield
University of Arkansas at Little Rock William H. Bowen School of Law, jwburchfield@ualr.edu

THE END OF AN ERA? ABOLISHING THE ABSTRACT REQUIREMENT FOR ARKANSAS APPELLATE BRIEFS

Jessie Wallace Burchfield*

I. INTRODUCTION

For more than a century, the Arkansas Supreme Court has required the appellant to prepare and file a condensed version of the record—an abstract—when initiating an appeal.[1] Not surprisingly, that abstracting requirement has often been a source of frustration for appellate attorneys and judges in Arkansas.[2] Indeed, members of the Arkansas appellate bar have tried to change or abolish the abstracting requirement over the decades, but those efforts always failed.[3]

Yet the time for change might finally be here. On June 6, 2019, the Arkansas Supreme Court published for comment proposed rules that would eliminate the abstract and addendum

---

*Associate Dean for Information and Technology Services, Law Library Director, and Associate Professor of Law, William H. Bowen School of Law, University of Arkansas at Little Rock. The author is grateful to Paul Charton, Appellate Review Attorney for the Clerk of the Arkansas Supreme Court and Court of Appeals, for inspiring this article and providing insight and information, and to former Arkansas Supreme Court Justice Robert L. Brown for his encouragement and helpful suggestions. I would also like to thank my colleagues Professors Anastasia Boles, Robert Minarcin, and Melissa Serfass for their feedback on drafts. Thanks are also due to my husband, Michael Burchfield, for his relentless support and encouragement while I focused on research and writing.

1. *See generally* § II *infra*.

2. *See, e.g.*, George Rose Smith, *Arkansas Appellate Practice: Abstracting the Record*, 31 ARK. L. REV. 359, 359–60 (1977) (acknowledging that the abstracting rule "creates more problems for the court and for the appellate bar than all the court's other rules put together").

3. Peter G. Kumpe, Jess Askew III & Andrew King, *The Insider's Guide to the Arkansas Appellate Courts*, *in* 1 APPELLATE PRACTICE COMPENDIUM 431, 442 (Dana Livingston ed., 2012). Those failures might have been influenced by the fact that some judges have defended the abstracting process. *See, e.g.*, Smith, *supra* note 2, at 360 (noting that Justice Smith supported the court's practice of requiring an abstract because "[n]o member of the court has been able to find a better alternative").

requirements. The court's order simultaneously announced a pilot project authorizing parties to immediately proceed under the proposed rules in cases with electronically filed records.[4] The announcement was met with praise by many in the Arkansas legal community.[5] This article examines the history of the abstracting requirement, including both problems arising from the rule and prior reform efforts, and then discusses the pilot project and proposed new rules.

II. HISTORY OF THE ABSTRACTING REQUIREMENT

The Arkansas Supreme Court began requiring an abstract in Rule IX of its 1885 rules.[6] Rule X of those rules provided that appellant's failure to comply with Rule IX would result in either dismissal of the appeal upon appellee's motion or affirmance of the ruling below.[7] Prior to this rule change, appellants were required to file only a copy of the record.[8]

Arkansas was not an outlier in 1885; requiring an abstract was once a common practice in many jurisdictions.[9] Before

---

4. *In Re Acceptance of Records on Appeal in Electronic Format and Elimination of the Abstracting and Addendum Requirements*, 2019 Ark. 213 [hereinafter *2019 Announcement*].

5. *See, e.g.*, Andy Taylor, *Hallelujah! (In other words, the Arkansas Supreme Court is abolishing the abstract and addendum requirement.*), ARKANSASAPPEALS.COM (June 6, 2019), https://arkansasappeals.com/2019/06/06/hallelujah-in-other-words-the-arkansas-supreme-court-is-abolishing-the-abstract-and-addendum-requirement; ArkBar President [Brian Rosenthal], *Hallelujah!* (June 6, 2019 5:57 PM) (replying to Justice Rhonda Wood). Justice Wood's tweet announcing the proposed change was liked forty times and retweeted thirteen times. *See* @JudgeRhondaWood, *HUGE News from Arkansas Supreme Court*, TWITTER (June 6, 2019, 10:13 AM), https://twitter.com/JudgeRhondaWood/status/1136652223059021825).

6. *Rules of the Supreme Court of the State of Arkansas*, 43 Ark. 1, 3–4 (1885) ("In all cases except felonies . . . the appellant . . . shall file with the Clerk . . . an abstract or abridgment of the transcript setting forth the material parts of the pleadings, proceedings, facts and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of all questions presented to this court for decision.").

7. *Id.* at 4.

8. *See* ARK. CIV. CODE tit. XIX, § 862 ("It shall be the duty of the appellant to file . . . an authenticated copy of the record"); ARK. CRIM. CODE tit. IX, §§ 327, 340 (providing, respectively, that "appeal is taken by lodging . . . a certified transcript of the record" and that "appeal . . . shall be granted upon the condition that the record is lodged") *in* CODE OF PRACTICE IN CIVIL AND CRIMINAL CASES FOR THE STATE OF ARKANSAS (1869).

9. MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 595 (Arthur Vanderbilt, ed., 1949). ("It is the practice in many states to require, in addition to the record itself, a

1938, the federal rules and many state rules required a narrative summary of the testimony.[10] However, the Committee on Improvement of Appellate Practice of the American Bar Association recommended doing away with the abstracting requirement, and this recommendation was adopted by the ABA in 1938.[11] The recommendation stated that "abstracts of the record should not be required, but that such matters in the record as the parties desire to bring to the attention of the court should be set forth in appendices to the brief, either by summarized statement or quotation."[12]

By the time of a 1949 report examining acceptance of the 1938 ABA recommendations, several states had already eliminated the abstracting requirement, and Arkansas was in a minority.[13] However, the authors of the report noted that only ten states that had done away with the abstracting requirement were requiring summaries or quotations from the record as part of the brief, which was also recommended.[14] The committee reasoned that in those jurisdictions with no abstracting requirement and no requirement for inclusion in the brief of summaries or quotations from the record, the reviewing court would be forced to closely examine the entire record, making submission of a "sufficient number of copies of the record . . . a matter of necessity."[15] The inefficiency and undesirability of justices having to examine the entire record has been one of the most-cited arguments in favor of the Arkansas abstracting requirement.[16]

---

complete abstract thereof, which must be printed for the use of the members of the Court.").

10. ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES § 8.1, 196 (2d ed. 1989).

11. VANDERBILT, *supra* note 9 at 385–86, 422–24.

12. *Id.* at 422.

13. *Id.* at 423 ("Only a few states reported that the criticized requirement of abstracts of the record still exists: *Arkansas, Colorado, Illinois, Kansas,* and *Wyoming.*" (citations omitted)); *see also id.* at 424 (including national map).

14. *Id.* at 425.

15. *Id.*

16. Smith, *supra* note 2 at 361, n. 3 (citing Griffin v. Mo. Pac. R.R., 227 Ark. 312, 298 S.W.2d 55 (1957) ("It has been pointed out repeatedly that this court will not search the record; that it is wholly impractical for the seven members of this court to read the one record.")); *see also* Zini v. Perciful, 289 Ark. 343, 344, 711 S.W.2d 477, 478 (1986) (stating that "[i]t is impossible for us to consider the appellants' contentions, because

In 1953 the Arkansas General Assembly passed Act 555, purporting to simplify civil appeals.[17] Section 10 of the Act made provision for a party to "prepare and file . . . a condensed statement in narrative form of all or part of the testimony."[18] The section also provided that any other party to the appeal could require submission of the testimony in question-and-answer format if not satisfied with the narrative.[19] Section 12 of the Act required omission of "all matters not essential to the decision of the questions presented by the appeal"[20] and warned parties not to unnecessarily demand the question-and-answer format if the narrative summary sufficed, providing for the imposition of costs for violating this requirement.[21] Section 12 also clearly set out the rule that "[w]here the record has been abbreviated by agreement or without objection from opposing parties, no presumption shall be indulged that the findings of the

---

counsel have not provided us either with an exact quotation of the instrument in question or with an abstract of it. We have no idea how it reads. We are referred by the appellants to Exhibit 2 in the transcript, but *for a hundred years we have pointed out, repeatedly, that there being only one transcript it is impractical for all members of the court to examine it, and we will not do so*." (emphasis added)); Collins v. Duncan, 257 Ark. 722, 724–25, 520 S.W.2d 192, 193–94 (1975) (indicating that court affirmed when appellants failed to abstract a liquidated-damages clause in a contract, which was the exclusive remedy upon which they relied). After noting that

> [t]he appellants cite numerous cases on contract law and pertaining to measure of damages, the intention of parties, and ambiguity in contracts, but we are unable to determine whether the decisions cited by the appellants are applicable to the contract here involved because we do not know what the contract contained without each member of this court being required to read the single record in this case.

Id. at 724, 520 S.W.2d at 193, the *Collins* court then reiterated the longstanding rationale:

> As we have so often pointed out in prior cases, one transcript of the record is filed in a case on appeal to this court and time simply does not permit each of the seven members of this court to search the single record for the pertinent provisions pertaining to points involved on appeal. In many instances the record is voluminous and to require each member of this court to ferret out from a single record the matter necessary for a clear understanding of the question in controversy, would create an impossible situation.

Id. at 725, 520 S.W.2d at 193–94.

17. 1953 ARK. ACTS 1449 ("An Act to Simplify the Procedure of Appeals from the Circuit, Chancery and Probate Courts to the Supreme Court of Arkansas in Civil Cases; and for Other Purposes").

18. 1953 ARK. ACTS at 1453.

19. *Id.*

20. 1953 ARK. ACTS at 1454.

21. *Id.*

trial court are supported by any matter omitted from the record."[22]

The Arkansas Supreme Court, perhaps in response to Act 555,[23] revised Rule 9 in 1954, adding a requirement that a preliminary statement of the case and a list of the points on appeal precede the appellant's abstract and brief.[24] Rule 9 became Rule 4.2 when the rules of the Arkansas Supreme Court and the Arkansas Court of Appeals were revised and renumbered effective May 1, 1993.[25]

By the year 2000, only Arkansas, Oklahoma, and Oregon still required a narrative abstract.[26] Illinois rules permitted an appellate court to require an abstract, but in practice the court "never call[ed] for an abstract."[27] Oklahoma is the only other state that still requires a narrative summary of the record.[28] The Oregon rule now requires only an excerpt of the record, stating "[a]ll documents or parts of documents must be copies of documents included in the record, rather than summarized or paraphrased."[29] The Illinois rule was amended in 2017 to remove all references to an abstract.[30]

---

22. *Id.*; *see* Beevers v. Miller, 242 Ark. 541, 543–44, 414 S.W.2d 603 (1967) (citing cases).

23. David Newbern, *Truth in the Abstract, Trouble in the Telling*, 51 ARK. L. REV. 679, 682–83 (1998).

24. George Rose Smith, *The Introductory Portion of the Appellant's Brief*, 15 Ark. L. Rev. 357 (1961).

25. 311 Ark. 672, 673 (1993). The abstracting requirement was not substantively changed in this revision. *Id.*

26. John J. Watkins & Price Marshall, *A Modest Proposal: Simplify Arkansas Appellate Practice by Abolishing the Abstracting Requirement*, 53 Ark. L. Rev. 38, 48–49 (2000).

27. *Id.* at 49 n.68.

28. OKLA. S. CT. R. 1.11(e) (providing that "[t]he brief of the moving party shall contain a Summary of the Record, setting forth the material parts of the pleadings, proceedings, facts and documents upon which the party relies, together with such other statements from the record as are necessary to a full understanding of the questions presented to this Court for decision"). A recent article in the *Oklahoma Bar Journal* includes advice on writing the summary of the record. Susan Beaty & Kellie Laughlin, *Practical Tips for Civil Appellate Brief Writing in Oklahoma State Court*, OKLA. BAR J. (Oct. 2019), *available at* https://www.okbar.org/barjournal/oct2019/obj9008beatylaughlin/.

29. The relevant Oregon rule provides that

> The excerpt of record and any supplemental excerpt of record must be in the following form:
>
> > (a) All documents or parts of documents must be copies of documents included in the record, rather than summarized or paraphrased. Omissions,

III. JUSTIFICATION OF THE ABSTRACTING RULE

An important justification for Arkansas's abstracting requirement has been the need for the reviewing court to have access to the relevant facts impacting the issues on appeal. As famed legal scholar Karl Llewellyn wrote about appellate advocacy, "[t]he court is interested not in listening to a lawyer rant, but in seeing, or discovering, from and in the facts, where sense and justice lie," emphasizing that "[t]he court does not know the facts, and it wants to."[31] Arkansas Supreme Court Associate Justice David Newbern similarly observed that "[n]othing is more important in the process of deciding an appeal than the procedural and adjudicative facts of the case."[32]

In a 1905 opinion, the Arkansas Supreme Court reasoned that the abstracting requirement saved the litigant money by not requiring the entire record to be reproduced, but instead requiring that it be fully abstracted "so that each judge of the court may have the case in a condensed form" leaving out "extraneous matters and abandoned questions" and presenting only the "real questions."[33] The judges believed that by complying with the rule, attorneys could present their appeals "concisely and strongly" and also aid the court.[34]

Arkansas Supreme Court Justice George Rose Smith asserted that the abstracting requirement was "purely practical," pointing out that the record as a whole contains "captions and signatures to pleadings, their verification, irrelevant testimony, interlocutory orders, and so forth" that are unnecessary for understanding the issues on appeal and that "some condensation of the record is absolutely essential."[35] In a 1978 case, the court advised, "If the lawyer in preparing the abstract will remember

---

if not apparent, must be noted. No matter may be omitted if to do so would change the meaning of the matter included."

OR. R. APP. P. 5.50(5)(a).

30. ILL. S. CT. R. 342, *available at* http://www.illinoiscourts.gov/supremecourt/rules/Art_III/ArtIII.htm#342 (showing that reference to "abstract" has been removed).

31. Karl N. Llewellyn, *The Modern Approach to Counselling and Advocacy—Especially in Commercial Transactions*, 46 COLUM L. REV. 167, 183 (1946).

32. Newbern, *supra* note 23, at 679.

33. Neal v. Brandon & Baugh, 74 Ark. 320, 323–24, 85 S.W. 776, 777 (1905).

34. *Id.*

35. Smith, *supra* note 2, at 361.

that the Supreme Court Justices have never heard of his case until they pick up the brief to read it, the lawyer will have a better comprehension of what is required in abstracting."[36] Two decades later, Justice Newbern agreed that the record must be presented to the appellate court in a "condensed document that objectively depicts what happened to cause the appellant to allege that reversible error occurred in the trial court."[37]

IV. PROBLEMS WITH THE ABSTRACTING RULE

Many attorneys and judges would agree with Justice Smith's assertion that the abstracting requirement "creates more problems for the court and for the appellate bar than all the court's other rules put together."[38] Twenty years ago, two members of the Arkansas Supreme Court Committee on Civil Practice enumerated several problems with the Arkansas abstracting requirement:

- expense to litigants;[39]
- difficulty for attorneys;[40]
- appellate decisions not based on the merits of the cases;[41]
- a "Catch-22" between under- and over-inclusiveness in abstracts;[42]
- inconvenience for appellate judges and their law clerks;[43]

36. *Bank of Ozark v. Isaacs*, 263 Ark. 113, 114, 563 S.W.2d 707, 708 (1978).

37. Newbern, *supra* note 23, at 682.

38. Smith, *supra* note 2, at 359–60.

39. Watkins & Marshall, *supra* note 26, at 42–43 (quoting Newbern, *supra* note 18, at 683 (explaining that the appellant's attorney "must engage in hard and tedious work" that "translates into expense for any appellant, and potentially any appellee, who is represented by counsel")).

40. *Id.* at 43 (discussing the complexity and counterintuitive nature of the abstracting rules).

41. *Id.* at 43–44, nn. 44 & 45 (citing twenty-two cases in calendar year 1999 in which the Arkansas Supreme Court and the Arkansas Court of Appeals did not reach the merits due to finding the abstracts flagrantly deficient and another nineteen in which at least one issue on appeal was not addressed due to an insufficient abstract (citations omitted)).

42. *Id.* at 45–46 (citing Gerry Schultze, *What's Wrong with Appellate Law in Arkansas?* 31 ARK. LAW. 10, 12 (1996)).

- availability of the record;[44] and
- potential for the introduction of inaccuracies or distortions of the record.[45]

Matters not properly abstracted would not be considered. As the court declared in an 1892 case,

> [t]he appellant argues that the court erred . . . but his exception on that score has not impressed him as being serious enough to require him to point out the error by setting out the prayers in his abstract in accordance with the rules. We therefore take it as a waiver of the objection."[46]

In an 1893 case, referencing evidence alluded to in the appellant's brief as insufficient but not abstracted, the court stated that "[t]he rules of practice do not make it our duty to explore the transcript for . . . evidence . . . omitted; and, as it is not before us, we presume, in favor of the decrees, that the court's second, third, and fourth findings are correct."[47] In a 1948 case, the court defended the rule and reiterated that "reasonable enforcement of this rule of procedure is absolutely necessary to the orderly and efficient dispatch of the business of the court."[48] This "reasonable enforcement" has continued through the decades.[49] Because courts refuse to consider an

---

43. *Id.* at 46–47 (pointing out that abstracts "regularly contain hundreds of pages" and "[w]ith no detailed statement of facts in the briefs to guide them, appellate judges and their law clerks must ferret out the essential facts themselves." The authors give an example of a case with one issue in which the appellant's brief had a twenty-five page argument section (the maximum allowed without a grant of permission to enlarge), but the opening brief and abstract contained 400 pages bound in two volumes. *Id.* at 47 (citing SEECO, Inc. v. Hales, 330 Ark. 402, 954 S.W.2d 234 (1997)).

44. *Id.* at 47 (questioning the validity of the oft-made claim that seven justices could not possibly share a single record).

45. *Id.* at 47–48. The authors give an example of an abstract that combined testimony from the top of one page of the transcript with testimony from the bottom of the following page, inaccurately representing the witness's testimony. *Id.* at 48.

46. Koch v. Kimberling, 55 Ark. 547, 548, 18 S.W. 1040, 1040 (1892).

47. Ruble v. Helm, 57 Ark. 304, 21 S.W. 470, 471 (1893) (citing Massey v. Gardenhire, 12 Ark. 639 (1852)).

48. Golden v. Wallace, 212 Ark. 732, 733, 207 S.W.2d 605, 605 (1948) (citations omitted).

49. The court consistently reiterated this standard through the beginning of the twenty-first century. *See, e.g.*, Baptist Health v. Murphy, 365 Ark. 115, 123, 226 S.W.3d 800, 807 (2006) ("Baptist claims that it raised the argument at the February 26, 2004, hearing before the circuit court; however, as previously noted, although directed to do so by this court, Baptist failed to abstract the legal arguments presented at the hearing. We have been

issue that isn't properly abstracted, attorneys feel forced to abstract even marginally relevant materials just in case, making abstracts "too damn long,"[50] which defeats the goal of condensing the record.[51]

Historically, one of the most serious problems with the abstracting rule was the harsh outcome for appellants if an abstract was found flagrantly deficient. Prior to 2001, a flagrantly deficient abstract would lead to an automatic affirmance of the result below.[52] This rule was enforced rigorously[53] and was decried by the appellate bar as one of the

---

resolute and consistent in holding that all material information must be included in the abstract and that we will not be placed in the position of having seven justices scour the one record for absent information."); Cosgrove v. City of West Memphis, 327 Ark. 324, 328, 938 S.W.2d 827, 830 (1997) ("When we are unable to determine from the abstract what arguments were made to the trial court and the rulings of that court, we will not entertain those arguments on appeal."); Ark. Dep't of Human Servs. v. Harris, 322 Ark. 465, 466, 910 S.W.2d 221, 222 (1995) ("We will not reach an issue where the abstract does not show that it was raised in the trial court." (citing Johnson v. Lilly, 308 Ark. 201, 823 S.W.2d 883 (1992)); Dustin Grain Co. v. Gravette, 148 Ark. 655, 229 S.W. 717, 718 (1921) ("Of the two instructions now complained of, which the court did not give, it is sufficient to say that one of them is not abstracted and therefore cannot be considered.").

50. Gerry Schultze, *What's Wrong with Appellate Law in Arkansas?* 31 ARK. LAW. 10, 12 (1996).

51. An abstract can also be found flagrantly deficient for over-inclusiveness of non-essential material because "[e]xcessive abstracting is as violative of the rules as omissions of material pleadings, exhibits, and testimony." Forrest Const., Inc. v. Milam, 70 Ark. App. 466, 476, 20 SW3d 440, 446 (2000) (citing Schwarz v. Moody, 55 Ark. App. 6, 928 S.W.2d 800 (1996)).

52. Robert L. Brown, *The Arkansas Supreme Court: The Job and How It Has Changed*, ARK. LAW. 9, 11 (Winter 2005) (characterizing automatic affirmance as "draconian"); *see also Ruble*, 57 Ark. 304, 21 S.W. 470.

53. Moncrief v. State, 325 Ark. 173, 174, 925 S.W.2d 776, 777 (1996) ("We do not address the merits of the appeal because we find the appellant's abstract of the record to be flagrantly deficient under Ark. Sup. Ct. R. 4–2(b). For that reason, we affirm."); Bridger v. Mooney, 278 Ark. 225, 225, 644 S.W.2d 929, 929 (1983) (explaining, in a pro se case, that "[t]he appellant has failed to comply with Rule 9(d) of the Rules of the Supreme Court, so we affirm the trial court"); Ki v. Hartje, 294 Ark. 16, 18, 740 S.W.2d 143, 144 (1987) ("We cannot decide the points argued for the want of an abstract and, accordingly, we must affirm under Rule 9(d)."); Goodson v. Smith, 263 Ark. N-82, n–82 (1978) ("This appeal is affirmed because we find the abstract of the record to be flagrantly in violation of Rule 9(e)(2)."); Dyke Indus., Inc. v. E. W. Johnson Const. Co., 261 Ark. 790, 791, 551 S.W.2d 217, 218 (1977) ("We must affirm the trial court . . . because appellant's abstract of the record is in noncompliance with Supreme Court Rule 9(d)."); Fin. Sec. Life Assur. Co. v. Powell, 247 Ark. 609, 609, 447 S.W.2d 64, 64 (1969) ("The . . . appeal is affirmed for noncompliance with Supreme Court Rule 9(d), appellant having failed to abstract the complaint, answer, decree and doctor's report upon which it relies.").

three biggest problems in Arkansas appellate procedure.[54] A leading practitioner bemoaned the fact that "[i]nsufficient abstracting . . . will doom an appeal,"[55] and called on the court to "humanize" the rules so that more appellate cases could be decided on the merits rather than being summarily affirmed.[56] However, a judge of the Arkansas Court of Appeals noted in 1998 that the appellate courts continued to summarily affirm appeals if the abstract was flagrantly deficient, and that there had been ninety-four reported cases involving a flagrantly deficient abstract between 1970 and 1998.[57]

V. PRIOR REFORM EFFORTS

A. The Appendix Experiment

In 1988, the justices of the Arkansas Supreme Court proposed a revision to the rules because "[f]or some time [we] have been concerned about whether our system requiring abstracting of the record is worth the effort lawyers must devote to it, and thus the money litigants must invest in it, in each case."[58] The court proposed moving to an appendix system like

---

However, the court did make some exceptions where an affirmance would have been unduly harsh, noting in one case that although the abstract was "flagrantly deficient" in failing to "contain an impartial condensation of material parts of the record necessary to an understanding of all questions presented to the court for decision," it would not dismiss. Instead, the court found that "*affirmance based upon a flagrantly deficient abstract would be unduly harsh in this case*," and permitted "appellant's attorney to revise and provide a brief in compliance with Ark. Sup.Ct. R. 4–2(a)(6)." McGehee v. State, 344 Ark. 602, 604, 43 S.W.3d 125, 127 (2001) (emphasis added). The court also ordered the appellant's attorney to bear the associated expense. *Id.*

54. Schultze, *supra* note 50, at 10. The other two problems he identified were the timing of filing the notice of appeal and the timing of filing the record. *Id.*

55. *Id.* at 12.

56. *Id.* at 13.

57. Terry Crabtree, *Abstracting the Record*, 21 U. ARK. LITTLE ROCK L. REV. 1 (1998). Judge Crabtree pointed out that cases affirmed due to a flagrantly deficient abstract would typically not be published, so the number of affirmances for this rule violation would be much higher than those ninety-four reported cases. *Id.* at 1 n.5.

58. *In the Matter of the Revision of the Rules of the Supreme Court and Court of Appeals of the State of Arkansas*, 296 Ark. Appx. 581 (1988) [hereinafter *1988 Rules Proposal*]. Justice Hickman dissented, asserting that "[w]e have the best appellate procedure in America." *Id.* at 587.

those in the federal appellate courts and most other state appellate courts.[59]

Under the Federal Rules of Appellate Procedure, the appellant is responsible for preparing and submitting with the opening brief a single appendix containing

- relevant docket entries;
- relevant portions of the pleadings, charge, findings, or opinion;
- the judgment, order, or decision appealed from; and
- all portions of the record designated by either the appellant or appellee.[60]

What goes into the appendix and how it is prepared largely determines the cost of appellate review in any given case.[61] The appendix is "an addendum to the briefs for the convenience of the judges."[62] To keep the appendix from being over-inclusive, the rule allows both parties and the court to rely on parts of the record even if they are not included in the appendix.[63]

Under the proposed 1988 revision of the Arkansas rules, rather than requiring an abstract, the court would instead require submission of copies of those pages of the record "crucial to the decision of the case," in an appendix, with any necessary factual background included in the statement of the case.[64] The rules implementing the appendix system experiment became effective May 15, 1989, though appellants could still opt to use the abstract method through December 31, 1989.[65] The justices

59. *Id.* at 581.

60. FED. R. APP. P. 30 (a)(1).

61. CHARLES ALAN WRIGHT & MARY KAY KANE, 20 FEDERAL PRACTICE & PROCEDURE DESKBOOK § 111 (2d ed. 2019). Wright and Kane note that "[t]he question of the contents and preparation of the appendix was more controversial than any other question in the preparation of the Appellate Rules" *Id.* (footnote omitted).

62. *Id.* (citing Bernard J. Ward, *The Federal Rules of Appellate Procedure*, 28 FED. B.J. 100, 108 (1968)).

63. FED. R. APP. P. 30(a)(2).

64. *1988 Rules Proposal*, *supra* note 58, at 581.

65. *In Re: Amendments to the Arkansas Rules of Civil Procedure, the Arkansas Rules of Appellate Procedure, the Arkansas Supreme Court Administrative Orders, the Rules of the Arkansas Supreme Court and Court of Appeals, and the Inferior Court Rules*, 298 Ark. Appx. 666, 667 (1989).

announced their hope that the rule changes would decrease the expense of appellate litigation while increasing the ease and accuracy of evaluating appeals.[66]

Most appellant counsel continued under the old rules, not giving the court enough experience with the appendix system to compare the merits of the two systems, so the court extended the trial period until July 15, 1990.[67] In June 1990, the court announced another extension of the trial period, until March 1, 1991.[68] In the June 1990 per curiam order, the court noted that while appellate litigation costs might have decreased in appeals using the appendix method, the ease and accuracy of evaluating appeals had not increased as the justices had hoped.[69] In fact, they declared that the cases submitted with appendices had been "generally more difficult and time consuming" than the cases submitted under the old system.[70] The justices identified three problems with the appendix system:

- Many counsel failed to provide the required appendix table of contents;
- Counsel did not seem to understand the heightened importance of the statement of facts; and
- Counsel were including too much of the record in the appendix.[71]

The justices acknowledged that some of the problems were likely inevitable during the transition and expressed their hope that addressing the problems and extending the trial period would lead to the appendix method proving successful at easing the appellate review process.[72] Unfortunately, the court ultimately decided that the appendix system took longer and

66. *Id.*

67. *In Re: Amendments to the Arkansas Rules of Civil Procedure, the Arkansas Rules of Appellate Procedure, the Arkansas Supreme Court Administrative Orders, the Rules of the Arkansas Supreme Court and Court of Appeals, and the Inferior Court Rules*, 300 Ark. Appx. 633 (1989).

68. *In Re: Amendments to the Rules of the Arkansas Supreme Court and Court of Appeal*s, 302 Ark. Appx. 639, 640 (1990).

69. *Id.*

70. *Id.*

71. *Id.* at 641.

72. *Id.*

made the review process more difficult.[73] Effective August 1, 1991, the court once again required all briefs submitted in appeals to contain abstracts.[74]

The main problem the justices identified with the appendix method was attorneys' inability to adapt to the "expansion of the statement of the case, with appropriate appendix references, to an extent which would save members of the Court from having to scour the appendix for factual details."[75] They reiterated their desire for the appellate review system to be "as inexpensive and simple as possible" and indicated a possible future return to an appendix-type system with revisions.[76]

B. The Addition of an Addendum Requirement

In response to continuing problems with deficient abstracts leading to summary affirmances and thus preventing numerous appeals from being decided on the merits, the Arkansas Supreme Court proposed two rule changes in late 1997, adding an addendum requirement and formalizing the rules regarding the practice of allowing motions to supplement abstracts before cases are submitted for decision.[77] The changes were adopted in January 1998, to be effective for briefs filed after July 1, 1998.[78] The final rule added new subsection (a)(8) to Rule 4-2:

> ADDENDUM. Following the Argument (and after the signature and certificate of service if they are contained in the brief), the brief shall contain an Addendum which shall include photocopies of the order, judgment, decree, ruling, letter opinion, or administrative law judge's opinion, from which the appeal is taken. It should be clear where any item appearing in the Addendum can be found in the record. An item appearing in the Addendum should not be abstracted. Pursuant to subsection (c) below, the Clerk will refuse to accept an appellant's brief if it does not contain the required Addendum. The appellee's brief shall only contain

73. *In the Matter of Revision of the Rules of the Supreme Court and Court of Appeals of the State of Arkansas*, 306 Ark. Appx. 655, 655 (1991).

74. *Id.*

75. *Id.* at 655–56.

76. *Id.* at 656.

77. *In Re Supreme Court Rule 4-2,* 330 Ark. 878 (1997) (setting out proposed changes).

78. *In Re Supreme Court Rule 4-2*, 331 Ark. 611 (1998).

> an Addendum to include an item which the appellant's Addendum fails to include.[79]

The final rule also emphasized that "[a] document included in the Addendum pursuant to Rule 4-2(a)(8) should not be abstracted."[80]

C. The 2000 Proposal for a Return to the Appendix System

In 2000, the Committee on Civil Practice submitted proposed rules that would have replaced the abstract with "a detailed statement of facts and a separately bound appendix."[81] In crafting the proposal, the committee considered the previous appendix experiment, relevant scholarship on appellate procedure, current appellate rules in other states, their own experience as appellate practitioners, and comments from other experienced appellate lawyers, including the appellate practice committee of the Arkansas Bar Association and appellate attorneys in the Arkansas Attorney General's Office.[82] The committee had two ideals in mind: every appellate case should be decided on the merits, and each case should be decided as efficiently as possible for all involved.[83] Its members believed that requiring a statement of facts and an appendix rather than an abstract would help attorneys "distill the essentials" of their cases, assisting the court in more efficient dispositions.[84]

Unfortunately, despite nearly unanimous support from the Arkansas bar,[85] the court rejected the committee's proposal, instead adopting an alternative proposal crafted by appellate

79. *Id.* at 613.

80. *Id.* at 612 (referring to subsection (a)(6)).

81. Watkins & Marshall, *supra* note 26, at 51. The statement of facts would also have replaced and expanded the required statement of the case. *Id.*

82. *Id.*

83. *Id.* at 51–52.

84. *Id.* at 52.

85. John J. Watkins, *Abstracting the Record on Appeal: The Dragon Lives*, 2001 ARK. L. NOTES 85, 85 (reporting that "the audience erupted into spontaneous applause" when a speaker at the 2000 Annual Meeting of the Arkansas Bar Association described the Committee's proposal to eliminate abstracting, and also noting that a survey taken there revealed that 94.3 percent of attorneys attending were in favor of the proposal). Eighty-seven percent of the attorneys who later submitted comments to the Arkansas Supreme Court during the comment period for the Committee's proposal were in favor of it. *Id.* at 85–86.

justices.[86] The court acknowledged when announcing the decision that it had received many comments with the recurring theme that appeals should not be summarily affirmed due to deficiencies in the abstract but should be decided on the merits.[87] Another theme in the comments was that the abstracting practice was "behind the times," and "wasteful of attorney's time and client's money."[88] The court embraced the first contention, but rejected the second, declaring abstracting as still beneficial to the judges and attorneys: "In our view, the abstracting of testimony serves the court well and is not an antiquated process. We know the judges benefit from it, and we believe that the time expended by attorneys is rewarded when writing the argument portion of the brief."[89]

Though the justices were unwilling to entirely do away with the abstracting requirement, they did attempt to reform the process. To ensure that appeals would be decided on the merits, the rule was modified to give appellants who file a deficient abstract the opportunity to cure the defects.[90] The court also acknowledged that "abstracting of pleadings, exhibits, and other written documents is not the best means to understand such materials"[91] and that it would be more useful to examine the pertinent documents.[92] Thus, the court revised the rule regarding the addendum to expand it,[93] allowing inclusion of relevant pleadings and other written documents that previously had to be abstracted.[94] The revised rule for the addendum is set out in full below, with the relevant additions underlined:

---

86. *In Re: Modification of the Abstracting System—Amendments to Supreme Court Rules 2-3, 4-2, 4-3, and 4-4*, 345 Ark. 626 (2001) [hereinafter *2001 Modification*].

87. *Id.* at 627.

88. *Id.*

89. *Id.*

90. ARK. SUP. CT. R. 4-2(b)(3) (providing that "[w]hether or not the appellee has called attention to deficiencies in the appellant's abstract . . ., [i]f the court finds the abstract or addendum to be deficient . . . the court will notify the appellant that he or she will be afforded an opportunity to cure any deficiencies, and has fifteen days within which to file a substituted abstract, addendum, and brief."); *see also 2001 Modification*, *supra* note 86, at 632.

91. *2001 Modification*, *supra* note 86, at 627.

92. *Id.*

93. That rule had been added in 1998, *see supra* section V(B).

94. ARK. SUP. CT. R. 4-2(a)(8).

> *Addendum.* Following the signature and certificate of service, the appellant's brief shall contain an Addendum which shall include true and legible photocopies of the order, judgment, decree, ruling, letter opinion, or Workers' Compensation Commission opinion from which the appeal is taken, along with any other relevant pleadings, documents, or exhibits essential to an understanding of the case and the Court's jurisdiction on appeal. In the case of lengthy pleadings or documents, only relevant excerpts in context need to be included in the Addendum. Depending upon the issues on appeal, the Addendum may include such materials as the following: a contract, will, lease, or any other document; proffers of evidence; jury instructions or proffered jury instructions; the court's findings and conclusions of law; orders; administrative law judge's opinion; discovery documents; requests for admissions; and relevant pleadings or documents essential to an understanding of the Court's jurisdiction on appeal such as the notice of appeal. The Addendum shall include an index of its contents and shall also be clear where any items appearing in the Addendum can be found in the record. The appellee may prepare a supplemental Addendum if material on which the appellee relies is not in the appellant's Addendum. Pursuant to subsection (c) below, the Clerk will refuse to accept an appellant's brief if its Addendum does not contain the required order, judgment, decree, ruling, letter opinion, or administrative law judge's opinion. The appellee's brief shall only contain an Addendum to include an item which the appellant's Addendum fails to include.[95]

One member of the committee that had proposed the new appendix rule sharply criticized the court's decision to retain the abstracting requirement for testimony.[96] He observed that the new system might actually be worse than the prior system because of the way the required contents were ordered, which he characterized as "disjointed," potentially making it harder for

95. ARK. SUP. CT. R. 4-2(a)(7) as set out in *2001 Modification*, *supra* note 86, at 630–31. Though the court retained the abstracting requirement, allowing more materials to be placed in the addendum was "a movement away from abstracting." Josephine Linker Hart & Guilford M. Dudley, *Briefing in an Electronic Age*, 46 ARK. LAW. 18, 19 (Summer 2011).

96. Watkins, *supra* note 85, at 91–94.

judges and their clerks to quickly ascertain the key facts.[97] He also noted that though the court had essentially eliminated the "affirmance rule," it left standing the related doctrine treating the abstract and addendum as the record for purposes of appellate review.[98]

In March 2007, the court issued a per curiam order regarding "the diminishing quality of appellate briefs."[99] The court expressed concern about the number of cases in which re-briefing had to be ordered, delaying justice for the parties and making more work for the court.[100] The justices identified omissions in the abstract and addendum as a recurring deficiency second only to practitioners lodging unripe appeals and threatened a return to the affirmance rule.[101] In 2011 a commentator noted continuing problems in this area, with re-briefing ordered in nine cases in the 2007–2008 term; nineteen cases in the 2008–2009 term; and seven cases in the 2009–2010 term.[102] A study of Arkansas Supreme Court cases from 2006 to 2010 found that most re-briefing orders were the result of "deficiencies in the abstract and addendum."[103]

Meanwhile, the court published proposed rule changes in June 2009, including a change that would require referral to the Office of Professional Conduct in certain instances of uncured

---

97. *Id.* at 91 (pointing out that "[u]nder prior practice, the statement of the case preceded the abstract, which included a summary of the pleadings and other documents as well as testimony," but that under the new rule, "the statement of the case comes after the abstract, which contains only the abridged testimony, while documents appear in the addendum following the argument").

98. *Id.* at 93. Watkins referenced nineteen cases from calendar year 1999 in which the Supreme Court and Court of Appeals refused to reach particular issues not properly abstracted. He noted that although judges defend the rule by asserting that going to the record would slow decisionmaking, the result is that lawyers tend to include almost everything in the abstract and addendum, which surely must slow things down. *Id.* at 93–94; *see also* Schultze, *supra* note 50. For cases illustrative of the rule limiting the record on appeal to matters in the abstract, s*ee Wells v. State*, 2012 Ark. App. 151, 153 (2012) (noting that "[i]t is well-settled law that the record on appeal is confined to that which is abstracted, and failure to abstract a critical matter precludes this court from considering the issue on appeal" and collecting cases).

99. *In Re: Appellate Practice Concerning Defective Briefs*, 369 ARK 553 (2007).

100. *Id.*

101. *Id.* at 554.

102. Megan Hargraves, *Common Procedural and Jurisdictional Pitfalls to Avoid in Practicing Before the Arkansas Supreme Court*, 33 U. ARK. LITTLE ROCK L. REV. 119, 128 (2011).

103. *Id.*

non-compliance, and allowed the possibility of contempt, suspension of the privilege to practice in Arkansas appellate courts, or imposition of sanctions under Rule 11(c) of the Rules of Appellate Procedure—Civil.[104] In the final version of the amendments, which took effect January 1, 2010, the court declined to require referral to the Office of Professional Conduct, changing "shall be referred" in the proposed amendments[105] to "may be referred," but left open the possibility of the other sanctions for uncured non-compliance with the rules.[106]

In the January 1, 2010 amendments, the court sought to address some of the problems with the abstract and addendum requirements, and to clarify what should be abstracted.[107] The contents portion of the completely rewritten[108] abstract rule is set out below:

---

104. *In Re: Arkansas Supreme Court and Court of Appeals Rules 4-1 and 4-2*, 2009 Ark. 350 (2009) at 14 [hereinafter *2009 Proposed Amendments*].

105. *Id.*

106. *In Re: Arkansas Supreme Court and Court of Appeals Rules 4-1, 4-2, 4-3, 4-4, 4-7 and 6-9*, 2009 Ark 534 [hereinafter *2009 Adoption*]. For an example of a case in which the court referred an attorney to the Office of Professional Conduct for repeatedly failing to comply with the abstracting rules, see *Deere v. State*, *59* Ark. App. 174, 954 S.W.2d 943 (1997), in which the Court of Appeals did not mince words:

> We note at the outset that the abstract prepared by appellant's counsel is flagrantly deficient with respect to most of the points raised on appeal. Neither the search warrant nor affidavit exhibits were abstracted, even though the arguments under the first four points of appeal challenge the validity of the February 17 search and the evidence that was procured pursuant to it. Moreover, appellant's counsel did not abstract the original plea statement, conditions of suspension, petition for revocation, judgment and commitment order, and conditions of suspension related thereto. . . . Appellant's counsel has previously been notified about abstracting deficiencies. *See Allen v. Routon,* 57 Ark. App. 137, 943 S.W.2d 605 (1997). We direct the clerk to forward a copy of this opinion to the Supreme Court Committee on Professional Conduct.

Id. at 174, 954 S.W.2d at 944. Judge Griffen wrote a concurring opinion in *Deere* "to elaborate on the harm posed by appellant's counsel . . . in her persistent refusal to comply with the abstracting rule." *Id.* at 174 (Griffen, J., concurring). He too did not mince words, asserting that "[a] lawyer who knowingly violates court rules so as to expose her clients to summary adverse consequences does a dis-service to her clients and is harmful to the administration of justice." *Id.*

107. Brian Brooks, Rebecca Kane & Dee Studebaker, *Significant Decisions*, ATLA DOCKET 4, 4 (Winter 2010). The authors note that the rules changes stemmed from the court's frustration with deficient briefing as well as attorneys' frustration with a lack of clarity in the rules. They assessed the changes positively, but cautioned attorneys to read the new rules carefully. *Id.*

108. *See 2009 Proposed Amendments*, *supra* note 104, at 5–7.

> (5) *Abstract.* The appellant shall create an abstract of the material parts of all the transcripts (stenographically reported material) in the record. **Information in a transcript is material if the information is essential for the appellate court to confirm its jurisdiction, to understand the case, and to decide the issues on appeal.**
>
> > (A) *Contents.* All material information recorded in a transcript (stenographically reported material) must be abstracted. **Depending on the issues on appeal, material information may be found in, for example, counsel's statements and arguments, voir dire, testimony, objections, admissions of evidence, proffers, colloquies between the court and counsel, jury instructions (if transcribed), and rulings. All material parts of all hearing transcripts, trial transcripts, and deposition transcripts must be abstracted, even if they are an exhibit to a motion or other paper.** Exhibits (other than transcripts) shall not be abstracted. Instead, material exhibits shall be copied and placed in the addendum. **If an exhibit referred to in the abstract is in the addendum, then the abstract shall include a reference to the addendum page where the exhibit appears.**[109]

The rule regarding the addendum was also rewritten to lay out specific examples of the types of documents that should be in the addendum.[110] The contents portion is set out below:

> (8) *Addendum.* The appellant's brief shall contain an addendum after the signature and certificate of service. The addendum shall contain true and legible copies of the non-transcript documents in the record on appeal that are essential for the appellate court to confirm its jurisdiction, to understand the case, and to decide the issues on appeal. The addendum shall not merely reproduce the entire record of trial court filings, nor shall it contain any document or material that is not in the record.
>
> > (A) Contents.
> >
> > > (i) The addendum must include the following documents:

109. *2009 Adoption*, *supra* note 106, 4–6. (emphasis added).

110. *See 2009 Proposed Amendments*, *supra* note 104, at 8–11.

• the pleadings (as defined by Rule of Civil Procedure 7(a)) on which the circuit court decided each issue: complaint, answer, counterclaim, reply to counterclaim, cross-claim, answer to cross-claim, third-party complaint, and answer to third-party complaint. If any pleading was amended, the final version and any earlier version incorporated therein shall be included;

• all motions (including posttrial and postjudgment motions), responses, replies, exhibits, and related briefs, concerning the order, judgment, or ruling challenged on appeal. But if a transcript (stenographically reported material) of a hearing, deposition, or testimony is an exhibit to a motion or related paper, then the material parts of the transcript shall be abstracted, not included in the addendum. The addendum shall also contain a reference to the abstract pages where the transcript exhibit appears as abstracted;

• any document essential to an understanding of the case and the issues on appeal, such as a will, contract, lease, note, insurance policy, trust, or other writing;

• in a case where there was a jury trial, the jury's verdict forms;

• defendant's written waiver of right to trial by a jury;

• in a case where there was a bench trial, the court's findings of fact and conclusions of law, if any;

• the order, judgment, decree, ruling, letter opinion, or administrative agency decision from which the appeal is taken. In workers' compensation appeals, the administrative law judge's opinion shall be included when it is adopted in the order of the full commission. If the order (however named) incorporates a bench ruling, then that ruling must be abstracted and the addendum must contain a reference to the abstract pages where the information appears as abstracted. The transcript (stenographically

> reported material) containing the ruling may also be copied in the addendum or omitted, at the appellant's choice;
>
> • all versions of the order (however named) being challenged on appeal if the court amended the order;
>
> • any order adjudicating any claim against any party with or without prejudice;
>
> • any Rule of Civil Procedure 54(b) certificate making an otherwise interlocutory order a final judgment;
>
> • all notices of appeal;
>
> • any postjudgment motion that may have tolled the time for appeal, and is therefore necessary to decide whether a notice of appeal was timely filed;
>
> • any motion to extend the time to file the record on appeal, and any related response, reply, or exhibit;
>
> • any order extending the time to file the record on appeal; and
>
> • any other pleading or document in the record that is essential for the appellate court to confirm its jurisdiction, to understand the case, and to decide the issues on appeal. For example, docket sheets, superseded pleadings, discovery related documents, proffers of documentary evidence, jury instructions given or proffered, and exhibits (such as maps, plats, photographs, computer disks, CDs, DVDs).
>
> (ii) *Waiver of addendum obligation*. If an exhibit or other item in the record cannot be reproduced in the addendum, then the party making the addendum must file a motion seeking a waiver of the addendum obligation.[111]

The general rule for deciding whether an exhibit should be in the abstract or in the addendum is "if the court reporter takes it down and it's material, it gets abstracted. Otherwise it goes in

111. *2009 Adoption*, *supra* note 106, at 7–9.

the addendum."[112] For other documents, from a practitioner point of view, "if a pleading or document has anything at all to do with preservation of an issue for appeal, jurisdiction on appeal including the timeliness of filing the appeal or the record, or the issues discussed on appeal, it needs to be included in the addendum or abstracted.[113]

Prior to 2011, deficiencies in the abstract or addendum could be addressed in one of three ways under Rule 4-2 (b):

- The appellee could call attention to the deficiency and had the option to submit a supplemental abstract or addendum and submit a motion requesting costs.[114]
- If the case had not yet been submitted to the court, the appellant could file a motion to supplement the abstract or addendum and file a substituted brief.[115]
- The court could address the question of deficiencies at any time. If deficiencies would keep the court from reaching the merits or cause unreasonable or unjust delay, the court would give the appellant an opportunity to cure the deficiencies and file a substituted abstract, addendum, and brief at his or her own expense.[116]

In 2011, upon recommendation by the Civil Practice Committee, the court added Rule 4-2(b)(4), which provides a fourth alternative for addressing a defective abstract or addendum. Under the new provision, if deficiencies or omissions in the abstract or addendum need to be corrected, but complete re-briefing is not needed, then the court will order the appellant to file a supplemental abstract or addendum.[117]

---

112. Brooks et al., *supra* note 107, at 4.

113. *Id.*

114. ARK. SUP. CT. R. 4-2 (b)(1).

115. ARK. SUP. CT. R. 4-2 (b)(2).

116. ARK. SUP. CT. R. 4-2 (b)(3). This is the 2001 amendment that essentially did away with the affirmance rule: "Appeals will no longer be affirmed because of the insufficiency of the abstract without the appellant first having any opportunity to cure the deficiencies." *2001 Modification*, *supra* note 86, at 627.

117. *In Re 4-2(b) of the Rules of the Supreme Court and Court of Appeals*, 2011 Ark. 141 (providing that supplement is to be filed within seven calendar days).

VI. THE 2019 PILOT PROJECT AND PROPOSED NEW RULES

The court's June 2019 per curiam contained four important announcements:

- Immediate authorization for electronic filing of all case-initiating documents, including appellate records, in Arkansas appellate courts;
- Proposed amendments to appellate court rules incorporating electronic filing, eliminating the abstract and addendum requirements for briefs, and updating appellate briefing rules;
- Authorization for parties in cases with electronically filed records to immediately proceed under the proposed new rules as a pilot project; and
- An exploration of automating the filing of electronic records, relieving appellants' attorneys of the burden of filing the record.[118]

The court made clear that the proposed rule changes anticipate a future system of comprehensive electronic filing.[119] In the last decade, the court has made several steps in the direction of mandatory e-filing in appeals.[120] The court authorized voluntary e-filing of "select motions, petitions, and responses thereto" in 2015.[121] Electronic filing of motions, petitions, and responses that were not case-initiating and required no fee became mandatory on September 21, 2016.[122] The court authorized acceptance of electronic briefs via the court's electronic filing system, eFlex, in 2016.[123] Electronic

118. *2019 Announcement*, *supra* note 4, at 1.

119. *Id.*

120. *Id.* at 1–2. The court embraced the concept of electronic filing as early as 2010 in its Administrative Order Number 21, encouraging courts statewide to implement e-filing systems and authorizing adoption of e-filing in the Arkansas appellate courts. *In Re Administrative Order No. 21—Electronic Filing*, 2010 Ark. 304.

121. *In Re Appellate Motion Electronic-Filing Pilot Project*, 2015 Ark. 282 ("[W]e authorize the establishment of an electronic-filing pilot project limited to select motions filed in the appellate courts to begin this summer as a first step toward mandatory electronic filing in the appellate courts.").

122. *In Re Appellate-Motion Electronic-Filing Pilot Project and Appellate-Brief Electronic-Filing Pilot Project*, 2016 Ark. 314, at 1.

123. *Id.* Parties electing to file briefs electronically were still required to file three paper copies of each brief within five calendar days of the electronic filing. *Id.* at 2.

filing became mandatory for briefs filed by represented parties on January 1, 2018.[124] Effective the same date, for represented parties, the clerk's office began serving the orders and opinions of the Arkansas appellate courts electronically via eFlex rather than mailing hard copies.[125] Most recently, the court authorized acceptance of petitions for review and petitions for rehearing via eFlex in March 2019, noting software enhancements that allowed the system to process payment of filing fees.[126] The transition period was shorter for this change, with mandatory e-filing required effective July 1, 2019.[127] The rules continue to allow conventional paper filing for pro se litigants or persons with special needs that would prevent electronic filing.[128]

Twenty-one of the state's twenty-eight circuit courts required electronic filing as this article was being prepared for publication in the spring of 2020.[129] Two additional circuits have announced that electronic filing will be mandatory by the end of 2020.[130] But even in those circuits that do not currently mandate electronic filing, circuit court staff must provide the record in electronic format upon request, subject to payment of any required fees for such preparation.[131]

The proposed rules contain an important format change, requiring separation of the circuit clerk's portion of the record from the transcript prepared by the court reporter.[132] The clerk's portion and the transcript shall be separate documents, each in a

---

124. *In Re Mandatory Electronic Filing of Appellate Briefs and Electronic Service of Court Orders and Opinions*, 2017 Ark. 353, at 1.

125. *Id.* at 2.

126. *In Re Electronic Filing of Petitions for Rehearing and Petitions for Review*, 2019 Ark. 79 at 1–2.

127. *Id.* at 2.

128. *Id.* at 3 (showing elimination of special treatment for filings requiring payment of fees and retention of other provisions of Rule 2-1(a)).

129. *Electronic Filing Support and Contact Information*, ARK. JUDICIARY (n.d.), https://efile.aoc.arkansas.gov/eflexResources/footer/support.html (providing information about individual courts under *Circuit Courts* heading). E-filing is mandatory in the circuit courts of Baxter, Benton, Boone, Craighead, Crawford, Faulkner, Garland, Grant, Hot Spring, Howard, Little River, Lonoke, Marion, Miller, Newton, Pike, Pulaski, Searcy, Sevier, Van Buren, and Washington counties. *Id.*

130. *Id.* (indicating that the circuit courts of Jefferson and Lincoln counties will both begin mandatory electronic filing on December 2, 2020).

131. *2019 Announcement*, *supra* note 4, at 2.

132. *Id.*

PDF file, and each separately paginated.[133] Exhibits are to be scanned whenever possible and included in the transcript portion of the record. Documentary exhibits that cannot be scanned must be provided to the appellant or appellant's counsel for conventional filing and clearly identified as such in the electronic record.[134] To assist circuit clerks and court reporters, the Arkansas Supreme Court Clerk's Office provided model records for each on its website.[135] An appellate review attorney from the Clerk's Office has also conducted trainings at meetings of the state associations of circuit clerks and court reporters.[136]

The proposed rules for appellate briefs eliminate the abstract and addendum requirements, replacing the abstract and addendum with an updated jurisdictional statement and an enlarged statement of the case and facts section.[137] "[A]ll of the factual and procedural information needed to understand the case and decide the issues on appeal" should be included in the statement of the case and the facts.[138] For all parts of the brief, parties are instructed to cite directly to the PDF page numbers of the circuit clerk's portion or the court reporter's portion of the electronic record containing the relevant information.[139]

In the order announcing the new rules and the pilot project, the court noted that with the adoption of electronic records on appeal, the abstract and addendum sections of the brief are no longer necessary,[140] declaring that "the problems that arose when there was only one paper record of the trial court's proceedings are no more."[141] The court also referenced the prior reform efforts, noting that those efforts were made during a time when there was still only one paper appellate record and the

133. *Id.* If either portion is thirty megabytes or larger, that portion must be divided into separate consecutively paginated PDF files that are under the thirty-megabyte limit. *Id.* at 2–3.

134. *Id.* at 3.

135. Arkansas Judiciary, Clerk of the Courts, *Pilot Project for Electronic Records on Appeal*, ARCOURTS.GOV (n.d.), https://www.arcourts.gov/courts/clerk-of-the-courts/pilot.

136. E-mail from Paul Charton, App. Rev. Att'y, Office of the Clerk—Ark. S. Ct. & Ct. of App., to Author (Feb. 3, 2020, 3:01 PM CST) (copy on file with author).

137. *2019 Announcement*, *supra* note 4, at 3.

138. *Id.* at 3–4.

139. *Id.* at 4.

140. *Id.*

141. *Id.* at 5.

appellate judges firmly believed abstracting testimony was still necessary if they were to understand the record and the context of the decision below.[142]

VII. PARTICIPATION IN THE PILOT PROJECT

From July 1, 2019, through March 23, 2020, 585 appeals that required full briefing were lodged with either the Arkansas Supreme Court or the Arkansas Court of Appeals.[143] Out of those 585, a total of seventy-five records were lodged electronically.[144] This represents slightly less than thirteen percent, suggesting that the majority of appellate attorneys have thus far chosen not to take the leap. Perhaps more should have tried the pilot program, because the Arkansas Court of Appeals has ordered re-briefing or supplementation in at least seven of the traditionally filed cases due to deficiencies in either the abstract or addendum or both,[145] and the Arkansas Supreme Court has declined to reach the merits in at least one.[146]

The Court of Appeals ordered re-briefing in three cases due to a deficient abstract related to verbatim copying of the transcript.[147] In seven of the cases in which re-briefing was

142. *Id.*

143. Email from Cassandra Butler, Exec. Assistant to Clerk of Ark. S. Ct., to Author (Mar. 23, 2020, 1:23 P.M. CDT) (copy on file with author).

144. *Id.*

145. *See infra* notes 148–49.

146. Pugh v. State, 2019 Ark. 319, 1, 587 S.W.3d 198, 200 (2019) ("In his brief, Pugh refers to his claim that there was a mistake in the sentencing order, but he does not include the motion in the addendum to his brief."). Justice Hart believed that refusing to allow Pugh an opportunity to correct the deficiency violated the rules:

> Mr. Pugh's addendum is deficient in that he has failed to include his motion to correct the sentencing order in his case. That motion, styled "Motion Seeking Order for Nunc Pro Tunc," appears in the record, but not in Mr. Pugh's brief. Our rule, Supreme Court Rule 4-2, requires that we give Mr. Pugh the opportunity to cure this deficiency. It is improper to simply point out the omission and refuse to take up the issue on appeal.

Id. at 8, 587 S.W.3d at 204 (Hart, J., dissenting). It bears noting that Pugh was a pro se appellant, *see id*. at 1, 587 S.W.3d 200 (referring to appellant's pro se status), and may not have had the resources or technical proficiency to file electronically.

147. Thomas v. State, 2019 Ark. App. 479, 2 (2019) ("Thomas's abstract is a verbatim reproduction of the transcript and is submitted entirely in question-and-answer format. This is expressly forbidden by Rule 4-2(a)(5)(B)." (citations omitted)); *Roberts v. Roberts*, 2019 Ark. App. 393, 2 (2019) ("Rather than abstracting the bench trial in the first person, appellant reproduced the transcript in question-and-answer format. This is expressly

ordered, essential information or documentation was missing from the abstract or addendum.[148] The court ordered supplementation of the addendum, but not full re-briefing, in at least three other cases, two because the addendum lacked a

prohibited, as the rule clearly mandates that '[t]he question-and-answer format shall not be used.' . . . Due to appellant's failure to comply with our rules concerning abstracting, we order appellant to file a substituted abstract, addendum, and brief curing the deficient abstract." (citations omitted)); Genz v. Carter-Cooksey, 2019 Ark. App. 339, 2 (2019) (explaining that "[r]ather than condensing and abstracting the transcript in the first person," appellants created "a 475-page abstract" of which "an overwhelming portion . . . is a verbatim replication of the trial transcript" and concluding "that appellants' abstract does not comply with Arkansas Supreme Court Rule 4-2," but declining to strike the brief and ordering appellants to "file a substituted brief, curing the deficiencies in the abstract").

148. Torres v. State, 2020 Ark. App. 158, 3 (2020) (ordering remand to settle and supplement the record, giving appellant additional time after settlement to file a new abstract, and noting that the original addendum did not "contain the August 30, 2012 plea agreement that sets forth the conditions of his probation," characterizing it as "essential" to review of the case); Morgan v. Ark. Dep't of Human Servs., 2020 Ark. App. 128, 2 (2020) (remanding to settle and supplement the record and ordering re-briefing because "[i]t appears that the addendum in this case is missing the petition for emergency custody and dependency neglect; the ex parte order for emergency custody; the order on probable cause; and the June 21, 2018 permanency-planning order," recognizing that "[t]hese documents are necessary because the process leading up to a termination of parental rights consists of a series of hearings—probable cause, adjudication, review, no reunification, disposition, and termination—and all of these hearings build on one another, and the findings of previous hearings are elements of subsequent hearings"); Hurst v. Riceland Foods, Inc., 2020 Ark. App. 85, 3 (2020) (remanding for supplementation of the record and ordering re-briefing because "[t]he addendum contained in the filed brief must contain all relevant documents that are essential to an understanding of the case and this court's jurisdiction on appeal"); Bugg v. Bassett, 2020 Ark. App. 41, 4 (2020) (noting that the addendum in a pro se case was deficient and ordering re-briefing because "[i]n his current brief, Bugg has entirely failed to correct his previous deficiencies and has created others," including his condensing the fifty-two-page transcript of a hearing into four pages and thirteen pages of witness testimony into "a single sentence"); Johnson v. State, 2019 Ark. App. 548, 2 (2019) (citing problems with the addendum, ordering re-briefing, and noting that although the appellant argued that " the trial court abused its discretion in denying his motion to sever," the relevant hearing transcript was not abstracted and the court did not have "the oral arguments presented to the court or the court's oral ruling from that hearing," both of which were "clearly essential" to the court's ability to decide the case); Childers v. State, 2019 Ark. App. 461, 2 (2019) ("Here, Childers's brief is deficient because his addendum lacks relevant pleadings essential to an understanding of the case and to confirm our jurisdiction. . . . [T]he addendum fails to include the final general court-martial order and the supporting written offer to plead guilty. Therefore, we direct Childers to file a supplemental addendum including the necessary documents."); Bens v. State, 2019 Ark. App. 355, 2–3 (2019) (declaring abstract deficient both for failing to abstract essential information and for including irrelevant information; noting that "counsel failed to include a motion for extension of time for filing the record and the order granting that extension" in the addendum, although they were "essential" to confirming the court's jurisdiction; and requiring their inclusion in the substituted addendum along with guilt-phase verdict forms omitted from the original addendum).

physical copy of a DVD containing information essential to the appeal.[149]

Filing electronically under the pilot project might not have solved all of the problems in the cases where re-briefing or supplemental briefing was ordered. In two of the cases, the court required a physical copy of a DVD.[150] The appellants in each likely would still have been required to supplement the record had they initially left out the DVDs. But problems such as those created by copying transcripts verbatim into the abstract[151] would not have arisen. Electronic filing would likely not have been an option for the pro se litigants,[152] but the ability to file an electronic record and to avoid having to submit an abstract and addendum might have helped them be heard.

The limited participation in the pilot project is reminiscent of the failed appendix experiment of 1989–1991.[153] However, though the comment period ended on February 28, 2020, the pilot project allowing appeals under the proposed new rules continues, and participation will likely increase as more trial courts move to electronic filing.

---

149. Watts v. State, 2020 Ark. 102, 2 ("We cannot reach the merits of Watts's appeal because he omitted the following items from the addendum: (1) a physical copy of the DVD 'confession' that was played to the jury (State's exhibit No. 49) and (2) his proposed redacted version of the transcript of the DVD (defendant's proffered exhibit No. 1). These two items are essential for us to understand and decide this appeal as it has been presented to us."); *Shoulders v. State*, 2020 Ark. App. 125, 2 (2020) ("During the suppression hearing, the State introduced a DVD containing a recording of the trooper's dashcam video of the traffic stop, during which the trooper asked for Shoulders's consent. Shoulders argues on appeal that he did not consent to the search, and the State counters that he did. The exchange between the trooper and Shoulders is thus critical to our understanding of the case. Shoulders, however, did not include a physical copy of the DVD in his addendum. Rather, the addendum contains a photocopy of a photograph of the DVD." (footnote omitted)); *Bray v. Bray*, 2019 Ark. App. 422, 2 (2019) (remanding to settle and supplement the record and ordering filing of a supplemental addendum because "[a]lthough appellant states that such an order exists, it is not in the record" and "appellant's statement of the case mentions several motions for change of custody as well as court orders addressing those motions . . . [that] are also not contained in the record").

150. *Watts*, 2020 Ark. App. 2; *Shoulders*, 2020 Ark. App. 125.

151. *See supra* note 147 (collecting cases).

152. *Pugh*, 2019 Ark. 319; *Bugg*, 2020 Ark. App. 4**;** *see also* note 146, *supra* (discussing Justice Hart's dissent in *Pugh*).

153. *See supra* notes 58–76 and accompanying text.

VIII. FORMAL COMMENTS ON THE PROPOSED RULE CHANGE

Written comments on the proposed rule change were overwhelmingly positive. A total of fourteen written comments were submitted during the comment period: eleven from appellate attorneys, two from appellate law clerks at the Arkansas Court of Appeals, and one from a circuit court reporter.[154] None of the comments suggested keeping the abstract requirement.[155] The comment from the circuit-court reporter did not address the abstract or addendum.[156] One appellate law clerk wrote to point out that the Arkansas Court of Appeals had just that week (the end of the comment period) received the first appeal filed under the pilot program and that an extension of the comment period would allow her to give relevant feedback.[157] The other appellate law clerk heralded the rule change as a "step in the right direction" and stated that "[r]emoving the abstracting requirement alone is removing a huge barrier to appellate practice in Arkansas."[158]

Four of the attorney comments were submitted the day the per curiam order was published. The first comment, submitted "on behalf of all five attorneys and the 10+ support staff" at a Little Rock criminal-defense firm, described the abstracting requirement as "vestigial" and suggested it was "lunacy" to continue with it in this "era of electronic filing."[159] Another attorney wrote to express his support for "the total elimination of

154. Copies of comments submitted to the Clerk are on file with the author.

155. *Id.*; *but see* note 158, *infra*, for comments in support of paper briefs and requiring an addendum.

156. Email from Brenda Thompson, Official Ct. Rep., Cir. Ct. Div. 1, 21st Judicial Cir., Crawford Cnty., to EROA Comments (Jan. 14, 2020, 11:55 AM CDT) (copy on file with author). Ms. Thompson's comment concerned her recommendation that an index to the transcript would be more efficient than a table of contents. *Id.*

157. Email from Lindsay Harper, L. Clerk to Mike Murphy, J., Ark. Ct. App., to EROA Comments (Feb. 27, 2020, 2:35 PM CDT) (copy on file with author).

158. Ltr. from Josie Richardson, L. Clerk to Mike Murphy, J., Ark. Ct. App., to Stacy Pectol, Clerk of Cts. (Feb. 25, 2020) (copy on file with author). Ms. Richardson noted that she was working with her first full case submitted under the pilot program. She advocated for keeping the addendum requirement and still requiring some paper copies of the brief. *Id.*

159. Email from Michael Kaiser, App. Att'y, James L. Firm, to EROA Comments (June 6, 2019, 11:56 AM CDT) (copy on file with author).

the abstracting and addendum requirement"[160] and noted his belief that this elimination "would greatly reduce the costs to litigants seeking appellate services."[161] Yet another wrote in support of elimination that "[a]bstracts serve very little purpose in the highly digitized world and whatever benefit they may offer is substantially outweighed by the hassle and effort they require."[162] The same attorney shared that the requirements to submit an abstract and addendum "have frustrated every appellate attorney I know."[163] The fourth attorney comment, received on June 6, noted that while the author would have liked to send "a more detailed and thoughtful response," he wished to show his support "immediately" for the elimination of the abstract and addendum requirements.[164] The comment concluded by noting that the elimination of these requirements "will promote access to the justice system, reduce undue stress on attorneys and litigants, and hopefully free them up to spend more time on research and advocacy."[165]

An attorney comment submitted on June 10 commended the court and all who had worked on the proposed rule changes, making the important point that these changes will help level the playing field and provide more access to justice: "[T]he elimination of the abstracting and addendum requirements will significantly reduce costs on appeal and allow parties to pursue their appellate rights who otherwise have been prevented by these unnecessary costs."[166]

The last six attorney comments were submitted in the final week of the comment period. Two of those attorneys specifically stated that they had filed appeals under the pilot program and

160. Email from William Zac White, Att'y & Counselor at L., to EROA Comments (June 6, 2019, 12:11 PM CDT) (copy on file with author).

161. *Id.*

162. Email from Tyler Ginn, Att'y at L., to EROA Comments (June 6, 2019, 12:00 PM CDT) (copy on file with author).

163. *Id.*

164. Email from Jordan Tinsley, Att'y at L., to EROA Comments (June 6, 2019, 4:51 PM CDT) (copy on file with author).

165. *Id.*

166. Email from Chad Pekron, Att'y, Quattlebaum, Grooms & Tull, to EROA Comments (June 10, 2019 11:31 PM CDT) (copy on file with author). Mr. Pekron also noted that allowing electronic submission of documents whenever possible both reduces costs and facilitates public access to those documents. *Id.*

found it "superior."[167] Three of the attorneys pointed out that the proposed changes are "understandable and workable."[168] They also noted that "[t]he time and cost savings associated with the elimination of the abstract and addendum requirements are significant."[169] A longtime appellate practitioner stated that "like every other appellate lawyer in Arkansas, despite the recommendations of George Rose Smith, I have struggled with the abstracting and addendum requirements."[170] He went on to say that these requirements "date back to the days of scriveners wearing sleeve garters and eyeshades."[171] Another practitioner shared his view that the statement of the case and the facts, citing directly to the electronic record, presents the court a far better product than under the old rule.[172] He voiced his strong support for permanent adoption of the proposed rules or a significant extension of the pilot program.[173]

In support of the contention that the proposed rules will save significant time and costs, one attorney commenter shared that her last appeal "cost thousands in copying and binding alone."[174] In sharp contrast to the former rationale that "it is wholly impractical for the [multiple] members of this court to read the one record,"[175] she called it "axiomatic in this day and age that three, six, seven, nine, or even twelve judges can share an electronic copy of the record."[176]

An attorney from Northwest Arkansas wrote to "join the chorus for eliminating the abstract and addendum requirement."[177] He stressed that many of his clients exhaust

167. Brooks, *infra* note 172; Davis, *infra* note 170.

168. Brooks, *infra* note 172; Mallett, *infra* note 174; Sharum, *infra* note 180.

169. Brooks, *infra* note 172; Mallett, *infra* note 174; Sharum, *infra* note 180.

170. Ltr. from Steve Davis, Davis Law Firm, to Stacey Pectol, Clerk of Cts. (Feb. 26, 2020) (copy on file with author). Mr. Davis filed his first appeal in the Arkansas Supreme Court in 1983. *Id.*

171. *Id.*

172. Ltr. from Brian Brooks, Att'y at L., to Stacey Pectol, Clerk of Cts. (Feb. 26. 2020) (copy on file with author).

173. *Id.*

174. Letter from Jess Virden Mallett, Att'y, L. Offices of Peter Miller, P.A., to Stacey Pectol, Clerk of Cts. (Feb. 26, 2020) (copy on file with author).

175. Smith, *supra* note 2 at 361, n.3.

176. Mallett, *supra* note 174.

177. Email from Matthew Kezhaya, Kezhaya L. PLC, to EROA Comments (Feb. 26, 2020 5:40 PM CDT) (copy on file with author).

their finances during trial and that the proposed new rules would significantly improve access to justice in Arkansas.[178] A Little Rock attorney applauded the proposed rules and stated his belief that the abstracting rule "has caused acrimony between attorneys and the Arkansas Supreme Court, with many attorneys believing the outdated abstracting rule exists only to discourage appeals."[179] A Fort Smith practitioner described the "old method" as "redundant and unnecessary" and praised the change allowing citation directly to the entire record.[180]

IX. CONCLUSION

When announcing the failure of the appendix experiment, the court signaled the possibility of a return to a similar system in the future. When rejecting the 2001 proposal to abolish the abstract requirement but making other modifications, the court acknowledged that advances in technology would eventually lead to further revision of the rules upon the full implementation of electronic filing.[181] It appears that time is imminent.

One of the primary reasons cited for the failure of the appendix experiment was that attorneys did not fully understand how to properly prepare the statement of the facts, and did not comprehend its importance.[182] As Professor Llewellyn said so well, "[t]he court does not know the facts, and it wants to."[183] Justices should not have to read the entire record to discern the facts, but abstracting the record is clearly not the best way to communicate the facts to the court. Replacing the abstract with an enlarged statement of the case and statement of facts, with appropriate citations that link directly to the electronic record, is a giant step forward for appellate advocacy in Arkansas.

---

178. *Id.*

179. Letter from Neil Chamberlin, Att'y, McMath Woods, P.A., to Stacey Pectol, Clerk of Cts. (Feb 26, 2020) (copy on file with author).

180. Letter from Stephen M. Sharum, Att'y at L. & Trial Att'y, to Stacey Pectol, Clerk of Cts. (Feb. 26, 2020) (copy on file with author).

181. *2001 Modification*, *supra* note 86, at 628.

182. See supra notes 68–71 and accompanying text. The other problems were over-inclusiveness in the appendix and failing to provide a table of contents for the appendix. Under the new rule, these will be non-issues.

183. Llewellyn, *supra* note 31, at 183.

Just because judges will have access to the entire record doesn't mean attorneys won't have work to do. Appellate advocates will have to carefully craft the statement of the case and statement of facts, citing in each to the relevant portions of the record. Attorneys (or their staff) may need training in linking from the statement of facts or statement of the case to the appropriate place in the record, creating bookmarks, managing large PDF files, and so on. But the new rules will save attorneys time, and they require no printing, copying, or binding costs, which in turn will save their clients money.

Arkansas was the first state to designate online opinions as official and stop producing print reports.[184] That leadership stands in stark contrast to the state's long struggle to modernize appellate briefing. It is time to join the vast majority of other states and follow through with abolishing the abstract and addendum requirements, leveraging the power of modern technology to maximize efficiency and improve access to justice.

184. *See* Arkansas Judiciary, *Reporter of Decisions*, ARCOURTS.GOV (n.d.), https://www.arcourts.gov/courts/supreme-court/reporter. Since February 14, 2009, all opinions of the Arkansas Supreme Court and the Arkansas Court of Appeals have been officially reported and distributed electronically on the Arkansas Judiciary website. *Id.*; *see also* Peter W. Martin, *Abandoning Law Reports for Official Digital Case Law*, 12 J. APP. PRAC. & PROCESS 25 (2011) (providing a view of the relevant history and assessing the Arkansas courts' early experience with digital publication).